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Nos. 88-1325 and 88-1328

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAXSON ELECTRIC COMPANY AND
WESLEY C. PAXSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

DYNALECTRIC COMPANY AND
G.W. WALTHER EWALT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a bid-rigging, profit-splitting conspiracy continues for purposes of the criminal statute of limitations until the conspirators receive their anticipated profits and payoffs on the rigged contract (Nos. 88-1325 and 88-1328).

2. Whether petitioners were properly convicted of mail fraud where the indictment charged that they deprived their victims of "money" and the jury was instructed that it must find that the victims were deprived of "money" in order to convict (No. 88-1325).

3. Whether it was an abuse of discretion for the district court to deny an evidentiary hearing on a claim that immunized testimony was improperly used by the government, where the district court found that the government made a detailed, thorough, and complete showing that it had not made any improper use of such testimony, and the objecting witness failed to demonstrate that an evidentiary hearing would adduce any information to rebut that showing (No. 88-1325).

4. Whether the district court abused its discretion in refusing to give certain proposed jury instructions (No. 88-1328).

5. Whether the district court abused its discretion in refusing to admit certain evidence that it found to be irrelevant (No. 88-1328).

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OPINIONS BELOW

The opinion of the court of appeals (88-1325 Pet. App. 1a-42a)[1] is reported at 859 F.2d 1559. The opinions of the district court (Pet. App. 44a-80a) are not reported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-1325.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. Petitions for rehearing were denied on January 4, 1989. The petition for a writ of certiorari in No. 88-1325 was filed on February 8, 1989. The petition for a writ of certiorari in No. 88-1328 was filed on February 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were convicted on one count of conspiracy to restrain interstate trade, in violation of the Sherman Act, 15 U.S.C. 1, and on two counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Wesley Paxson was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $126,000. Petitioner Paxson Electric Co. was fined a total of $951,000. Petitioner Dynalectric Company was fined a total of $1,501,000. Petitioner Ewalt was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $26,000. The court of appeals affirmed. Pet. App. 1a-42a.

1. Petitioner Paxson Electric Company (Paxson Electric), petitioner Dynalectric Company (Dynalectric), and a third electrical contractor, Fischbach and Moore, Inc. (Fischbach), all planned to submit bids in late 1979 on a $5 million electrical subcontract for a federally funded waste water treatment project in DeKalb County, Georgia, known as Snapfinger Creek. Petitioner Wesley C. Paxson, Sr., was the president of Paxson Electric. Petitioner Ewalt was the president of Dynalectric.

The evidence at trial showed that petitioners and Fischbach rigged their bids on the Snapfinger Creek project. Fischbach's Atlanta branch manager, Bernard Trepte,

testified that he met with Wesley Paxson and Walther Ewalt before the bids were to be submitted and agreed to rig the bids. The purpose of their agreement was to ensure that Paxson Electric would be the low bidder and would be selected for the job. In exchange, Paxson Electric agreed to forgive a pre-existing $89,000 debt that Fischbach owed it from an earlier project and agreed to give Dynalectric one-half of the profits that Paxson Electric would receive on the Snapfinger project. Paxson Electric was selected for the job and subsequently divided its $1.7 million profit with Dynalectric. Pet. App. 3a-4a.

Trepte's account of the bid-rigging agreement was corroborated by Paxson Electric and Dynalectric employees and by business records. The evidence showed that Dynalectric's bid was considerably higher than Dynalectric's branch manager had estimated that it would be. In addition, the evidence showed that petitioner Wesley Paxson directed his accountant to transfer the $89,000 Fischbach debt to the Snapfinger project and that no attempt was ever made to collect that debt. The evidence also established that Paxson Electric paid Dynalectric $880,000, approximately one-half of the profits on the Snapfinger project, even though Paxson Electric's affiliate, CCC Electric, had performed all the work and Dynalectric had not contributed any capital, equipment, or services to the project. See Pet. App. 4a, 27a-28a; 17 R. 1603-1604; 20 R. 2259, 2389-2391.[2]

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[2] Petitioners unsuccessfully argued at trial that the $880,000 payment was made pursuant to a silent joint venture between Dynalectric and Paxson Electric that was lawfully formed after the bids were submitted because Paxson feared that Ewalt would take the job away from him. 16 R. 1365; 20 R. 2387; 21 R. 2537. The evidence showed, however, that Paxson knew that his company had been designated as the electrical subcontractor by the general contractor at the time the bids were submitted; it also showed that the designation could not be

2. The court of appeals affirmed the convictions on all counts. Pet. App. 1a-42a. The court first rejected petitioners' contention that the prosecution was barred by the five-year criminal statute of limitations, 18 U.S.C. 3282. Contrary to petitioners' argument, the court of appeals concluded that the statute of limitations did not begin to run on the date on which the rigged contract was awarded.[3] Pet. App. 4a-17a. Adopting the position taken by every other court of appeals that has considered the issue, the court held "that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five-year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs." *Id.* at 8a-9a.[4] In this case, Dynalectric received its final payoff from Paxson Electric in 1983, and Paxson Electric continued to receive payments pursuant to the rigged contract until 1985 (*id.* at 4a); both events occurred well within the five-year period preceding the filing of the indictment.

The court of appeals also held that petitioners' mail fraud convictions were consistent with this Court's de-

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changed without Paxson Electric's consent. 13 R. 782; 19 R. 2078; 20 R. 2380; 22 R. 2724. The evidence further showed that the supposedly lawful silent joint venture was carefully kept secret both from the contracting authorities and from employees of Paxson Electric and Dynalectric. 9 R. 86-87; 13 R. 783; 16 R. 1310; 17 R. 1594-1595, 1640; 19 R. 2049; 20 R. 2387-2388; 21 R. 2402, 2436.

[3] The contract was awarded on January 14, 1980. The indictment was filed on September 16, 1986.

[4] The court rejected petitioners' reliance on the civil antitrust statute of limitations, 15 U.S.C. 15b, noting that it was not the appropriate statute of limitations in a criminal case. Pet. App. 13a. The court also found that "a central objective of a conspiracy to restrain trade is to garner illicit profits" and thus rejected petitioners' contention that a restraint of trade ends when the rigged bids are submitted. *Id.* at 14a.

cision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987). Pet. App. 17a-25a. The court pointed out that the indictment and the jury instructions in this case make it clear that the essence of the bid-rigging scheme was to defraud the scheme's victims of money. Unlike in *McNally*, the court concluded that the jury in this case must have based its verdict on a finding that petitioners had schemed to deprive their victims of money or property and could not have based its verdict on any deprivation of "intangible rights." Pet. App. 25a.

The court of appeals also rejected Paxson's contention that the government improperly used his immunized 1984 grand jury testimony to obtain the indictment and conviction in this case, in violation of *Kastigar* v. *United States*, 406 U.S. 441 (1972). Pet. App. 33a-37a. The court concluded that the government had "convincingly demonstrated an independent source for all portions of the evidence adduced before the indicting grand jury and at trial against Paxson which conceivably had any relation to his immunized testimony." *Id.* at 35a. The court similarly rejected Paxson's contention that he was entitled to an evidentiary hearing on the *Kastigar* issue. The court noted that the government had made a detailed showing that it had not used the immunized testimony. In addition, Paxson had access to all of the government's evidence supporting that showing. And in spite of having a full opportunity to do so, Paxson had failed to suggest any basis for challenging the government's showing. In those circumstances, the court of appeals concluded, the district court had not abused its discretion in denying a hearing. Pet. App. 36a-37a.

Finally, the court rejected petitioners' contention that the district court had abused its discretion in excluding certain evidence at trial. Pet. App. 26a-28a n.19. Petitioners sought to introduce evidence of instability in the economy

and various raw material markets. That evidence, they suggested, was relevant because it helped explain the seemingly high prices and profits on the Snapfinger project. The court of appeals affirmed the district court's ruling that the proffered evidence was irrelevant because "there was no evidence that any of the people who actually prepared the bids relied on the purported volatility" of market prices in preparing their bids. *Ibid.* The court also noted that the government had been barred from using evidence of unreasonably high prices and profits to establish the antitrust conspiracy. *Ibid.*[5]

ARGUMENT

1. Petitioners contend (88-1325 Pet. 11-14; 88-1328 Pet. 13-21) that the statute of limitations barred their prosecution because the indictment was returned more than five years after they submitted their rigged bids and the contract was awarded. The court of appeals correctly rejected that contention. It concluded that the bid-rigging conspiracy continued until the conspirators received and divided their anticipated profits on the illegal contract. Pet. App. 9a-10a. That ruling is in accord with the decisions of every other court of appeals that has addressed the question. *United States* v. *Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States* v. *Northern Improvement Co.*, 814 F.2d 540 (8th Cir.), cert.

[5] The court of appeals rejected numerous other challenges as well, several without discussion. Among the latter was the Dynalectric petitioners' contention that the district court erred in failing to instruct the jury on their defense that they acted pursuant to a lawful silent joint venture. 88-1328 Pet. 21-24. See Pet. App. 72a (district court ruling that petitioners' proposed instructions were "superfluous and confusing" and that the jury had properly been instructed that it must find that the charged bid-rigging agreement was made before the bids were submitted).

denied, 108 S. Ct. 141 (1987); *United States* v. *A-A-A Electrical Co.*, 788 F.2d 242, 244-246 (4th Cir. 1986); *United States* v. *Inryco, Inc.*, 642 F.2d 290, 293-295 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982).[6]

The principles governing the scope of a Sherman Act conspiracy were first enunciated by this Court in *United States* v. *Kissel,* 218 U.S. 601 (1910). In that case, the Court explained that a conspiracy is a partnership for criminal purposes that continues until its success or abandonment. *Id.* at 608, 610; accord *Hyde* v. *United States,* 225 U.S. 347, 369 (1912) (a conspiracy continues "until full fruition be secured"). Where there is no abandonment of

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[6] The Dynalectric petitioners rely on dicta in the *Inryco* case to suggest that the Ninth Circuit adheres to the narrower view that only overt acts that themselves restrain trade have the effect of continuing a Sherman Act conspiracy. 88-1328 Pet. 15-16. Although the *Inryco* court pointed out that there were such overt acts in the case before it, neither in *Inryco* nor in any other decision has the Ninth Circuit held that such acts are necessary for the conspiracy to continue. Moreover, in *United States* v. *Walker,* 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982), the Ninth Circuit held, under the general conspiracy statute, 18 U.S.C. 371, that if a conspiracy contemplates the division of the profits of an illegal scheme, the conspiracy continues for purposes of the criminal statute of limitations, regardless of whether the act of dividing the profits is itself illegal. *Id.* at 1350. The court in *Walker* also noted that that "seems to be one of the theories applied in *United States* v. *Inryco.*" *Ibid.* Petitioners' suggestion (88-1328 Pet. 16 n.22) that a Sherman Act conspiracy is different from other conspiracies for statute of limitations purposes is baseless. The same statute of limitations applies, and the courts of appeals before and after *Inryco* and *Walker* have correctly found no reason to adopt that distinction. See *Hyde* v. *United States,* 225 U.S. 347, 369 (1912) (applying the statute of limitations rationale of *United States* v. *Kissel,* 218 U.S. 601 (1910), a Sherman Act conspiracy case, to the general conspiracy statute). In short, petitioners' suggestion that the decision in the present case conflicts with the view of the Ninth Circuit is incorrect.

the goals of the conspiracy, it is the scope of the conspiratorial agreement that determines when the statute of limitations begins to run. *Grunewald* v. *United States,* 353 U.S. 391, 397 (1957).[7]

In this case, the indictment charged and the evidence showed that the agreement to rig bids included an agreement to divide the profits on the project.[8] The indictment

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[7] *Grunewald* does not hold that only conspiratorial objectives that are "criminal" serve to toll the statute of limitations. In *Grunewald,* the Court held only that proof that the conspirators concealed their illegal activities after the conspiracy had accomplished its objectives did not, by itself, establish that the concealment was part of the conspiracy. 353 U.S. at 402. *Grunewald* does not suggest that a conspiracy cannot be continued by acts that are legal and that it necessarily terminates on the last date on which the conspirators commit an act that is itself illegal.

[8] Petitioners suggest (88-1325 Pet. 12, 13; 88-1328 Pet. 15) that the statute of limitations began to run no later than the day that the bidding was completed, because after that date trade was no longer being "restrained" within the meaning of the Sherman Act. That suggestion is doubly wrong. First, as long as the conspiratorial agreement encompassed the receipt of profits on the rigged contract, acceptance of those profits continued the illegal conspiracy. Where a criminal conspiracy contemplates the receipt of illicit profits, the conspiracy continues until those profits are received, whether or not the charging statute makes the receipt of those profits illegal. *United States* v. *Girard,* 744 F.2d 1170, 1172 (5th Cir. 1984); *United States* v. *Helmich,* 704 F.3d 547, 549 (11th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Mennuti,* 679 F.2d 1032, 1035 (2d Cir. 1982); *Atkins* v. *United States,* 307 F.2d 937, 940 (9th Cir. 1962); *Koury* v. *United States,* 217 F.2d 387, 388 (6th Cir. 1954).

Second, trade was "restrained" every time DeKalb County and the federal agency involved in the project, the Environmental Protection Agency, made payments on the artificially set contract price. Petitioners might have abandoned their illegal enterprise at any time by giving notice of the fraud, making possible rescission of the illegal contract. Had they done so—thereby abandoning the conspiracy—the statute of limitations would have started to run at that time. *United*

was filed on September 19, 1986. Paxson Electric continued to receive its payments on the Snapfinger Creek project until at least January 1985, and it gave one-half of its anticipated profits to Dynalectric no earlier than 1983. The court of appeals was therefore correct in holding that the five-year statute of limitations did not bar this prosecution.[9]

2. Petitioners Paxson and Paxson Electric contend (88-1325 Pet. 14-18) that their mail fraud convictions are inconsistent with the decision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987), which held that the mail fraud statute is not violated by a scheme to defraud citizens of their intangible right to honest government services. The court of appeals correctly rejected that contention.

States v. *Kissel*, 218 U.S. at 610. Instead, petitioners continued to accept payments on the contract until 1985 and thereby continued their participation in the conspiracy. See *Hyde* v. *United States*, 225 U.S. at 369 ("Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law.").

[9] Because petitioners' offense continued until at least January 1985, when the last check was mailed to CCC Electric on the project (see Pet. App. 8a), Dynalectric's claim (88-1328 Pet. 17-18) that its sentence is unconstitutionally retroactive is also incorrect. Prior to its repeal, the "Alternative Fines" provision of the Criminal Fine Enforcement Act of 1984, 18 U.S.C. 3623(c)(1) (Supp. IV 1986), under which Dynalectric's enhanced fines were imposed, applied to "offenses committed after December 31, 1984." Pub. L. No. 98-596, §§ 6(a), 10, 98 Stat. 3137, 3138 (1984). Because the conspiracy continued past the effective date of Section 3623, the crime was within the coverage of that provision. See *United States* v. *Hartness*, 845 F.2d 158, 163 (8th Cir. 1988), cert. denied, 109 S. Ct. 308 (1988); *United States* v. *Giry*, 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, 108 S. Ct. 162 (1987); *United States* v. *Gibbs*, 813 F.2d 596, 601-602 (3d Cir. 1987), cert. denied, 108 S. Ct. 83 (1987); *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986).

The indictment in this case charged that the defendants committed mail fraud by defrauding DeKalb County and the United States Environmental Protection Agency of both "money" and "their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project * * *." 88-1328 Pet. App. 63a. In charging the jury on the mail fraud counts, moreover, the district court defined a scheme to defraud to include "any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses money or property from the persons so deceived." 24 R. 3326. As the court of appeals observed (Pet. App. 24a), the charge did not include any instruction on an "intangible rights" theory of mail fraud. The record thus reflects that, in this case, unlike *McNally,* the indictment charged that the victims were defrauded of "money," and the trial court charged the jury that a scheme to defraud includes an intent to "obtain * * * money or property" by false pretenses. The convictions did not rest on an "intangible rights" theory of mail fraud, as did the convictions in *McNally.*

Petitioners Paxson and Paxson Electric argue for reversal (88-1325 Pet. 16-18) on the ground that the jury was not expressly instructed that it must find that the victims of the scheme actually suffered a deprivation of money or property. As the court of appeals ruled (Pet. App. 29a-31a), however, the mail fraud statute does not require that the fraudulent scheme actually succeed. Moreover, as we have explained, the instructions were adequate to ensure that the jury actually found a scheme to defraud DeKalb County and the federal government of money or property. Furthermore, to show a fraudulent deprivation of money it is sufficient to demonstrate that the victims parted with money under false pretenses. Cf. *McNally,* 107 S. Ct. at 2882 (condemning absence of jury instruction

that "petitioners obtained property by means of false representations").[10] In this case, DeKalb County awarded the contract on the false representation that the bids were competitive.[11]

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[10] In fact, the court of appeals found that there was sufficient evidence that the victims of the fraud were actually "overcharged," in that Paxson Electric received more money than it would have received under a competitively bid contract. Pet. App. 26a-28a. Petitioners' claim that there was no overcharge is based largely on the district court's explanations that the jury could not infer bid rigging from the size of the bids or the profits received. See 88-1325 Pet. 17. In addition to the direct evidence of overcharge, however, once the jury found from co-conspirator testimony and documentary proof that the bids in fact were rigged, the inference was clear that the prices resulting from the rigged bids were higher than prices that would have resulted from competitive bidding.

[11] Contrary to petitioners' contention (88-1325 Pet. 15), the court of appeals' holding does not conflict with the Tenth Circuit's decision in *United States* v. *Shelton,* 848 F.2d 1485 (1988). There, as in *McNally,* the defendant was a public official, and the mail fraud count was based on the allegation that, through the receipt of illegal kickbacks from road and bridge building suppliers, the defendant had deprived the citizens of Muskogee County of their right to honest government. 848 F.2d at 1495. The Tenth Circuit concluded that when the jury instructions were "read together," they permitted the jury improperly to convict the defendant, not on the ground that he had deprived his victims (the citizens) of money (because the kickbacks came from suppliers), but merely on the ground that he had deprived the citizens of their intangible right to honest government. *Id.* at 1496. In contrast, both the indictment and the jury charge in this case make plain that the verdict was based on the finding that petitioners schemed to defraud the victims – DeKalb County and the federal government – of money.

More generally, as the court of appeals noted (Pet. App. 19a-20a), the task of determining whether a particular jury in a particular case might have improperly relied on a theory precluded by *McNally* has not proved "impossible" (88-1325 Pet. 16) for the courts of appeals. Of course, the problem is of ever-diminishing importance, as it arises

3. Petitioners Paxson and Paxson Electric renew their argument (88-1325 Pet. 6-11) that the district court should have held an adversarial hearing on the claim that immunized testimony was improperly used at trial in violation of *Kastigar* v. *United States,* 406 U.S. 441 (1972). The court of appeals correctly rejected that argument.[12]

On September 28, 1984, Paxson testified pursuant to a grant of immunity before a grand jury that had been investigating bid rigging in the electrical construction industry for more than two years. Paxson was asked about bid rigging generally and about the Snapfinger Creek project in particular. He denied any knowledge of or involvement in rigging any jobs, including Snapfinger Creek. As the court of appeals noted (Pet. App. 36a), Paxson's testimony "drew the Snapfinger investigation to a halt for thirteen months" until Bernard Trepte was called before the grand jury and "revealed substantial inconsistencies with Paxson's immunized testimony about the Snapfinger project." Trepte's testimony, together with information that the grand jury had gathered in the two years before Paxson testified, led to the present prosecution.

In response to *Kastigar* motions, the government took steps to meet its burden of showing that its evidence against Paxson was independently derived. The government supplied the court with a 65-page affidavit and 50

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only out of pre-*McNally* trials. For the future, Congress has overturned *McNally* by amending the federal fraud statutes to cover schemes to deprive others of the intangible right to honest services. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508.

[12] This argument is, of course, open only to petitioner Wesley Paxson and not to petitioner Paxson Electric, because Wesley Paxson's immunized testimony could have been freely used against the company without violating any right of the company's. See generally *Braswell* v. *United States,* 108 S. Ct. 2284 (1988).

exhibits that "meticulously linked the independent sources of evidence * * * to each piece of evidence presented to the indicting grand jury and to be adduced against Paxson at trial." Pet. App. 34a. The magistrate, the district court, and the court of appeals, all of whom reviewed those submissions, concluded that the government had met and exceeded its heavy burden of showing that Paxson's self-serving, exculpatory grand jury testimony had not been used directly or indirectly in his criminal prosecution. *Id.* at 37a, 35a.[13]

Given the strength of the government's showing on the *Kastigar* issue in this case, the courts below correctly concluded that no useful purpose would have been served by

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[13] Relying on *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), the Paxson petitioners assert that the government's burden under *Kastigar* is particularly heavy when a government attorney familiar with immunized testimony participates in the prosecution of the case. 88-1325 Pet. 8. As petitioners recognize (88-1325 Pet. 8 n.5), however, the Eleventh Circuit is not in disagreement with the Eighth Circuit on this point. See Pet. App. 34a n.26; *United States* v. *Hampton*, 775 F.2d 1479, 1485-1486 (11th Cir. 1985).

The Eleventh Circuit simply concluded that the government had met its heavy burden in this case. Pet. App. 35a-36a. The facts here are quite different from those in *McDaniel*. There, the defendant had given three volumes of highly inculpatory evidence to a state grand jury, and the federal prosecutors, not knowing that the testimony had been given under a grant of immunity, prosecuted the defendant after reviewing the incriminating testimony. 482 F.2d at 307-308. Stressing the unusual circumstances of that case (*id.* at 312), the court held that, because the United States Attorney "could have perceived no reason to segregate McDaniel's [incriminatory] testimony from his other sources of information * * * the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by *Kastigar*." *Id.* at 311. In this case, by contrast, Paxson's grand jury testimony was exculpatory, and all of the government attorneys who reviewed it knew that it was immunized and could not be used in any subsequent criminal prosecution.

granting Paxson the evidentiary hearing that he had requested. By the end of the trial, Paxson had reviewed all of the government's submissions detailing the independent sources for its trial evidence and had heard all of the evidence adduced at trial. Nonetheless, he could not point to anything in the record to support his contention that the government had violated *Kastigar.*[14] In these circumstances, the court of appeals properly held that the denial of a "full-blown post-trial evidentiary hearing" was not an abuse of discretion. Pet. App. 36a-37a; see *United States* v. *Provenzano,* 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Lipkis,* 770 F.2d 1447, 1451 (9th Cir. 1985).[15]

4. The Dynalectric petitioners contend (88-1328 Pet. 21-24) that the district court improperly failed to instruct the jury on "the role of the Paxson-Dynalectric joint ven-

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[14] The Paxson petitioners state that an adversarial evidentiary hearing would have enabled them to "probe what uses may have been made of [Paxson's] testimony" (88-1325 Pet. 9), and they speculate that an unspecified, non-evidentiary use might have been made of the immunized testimony by unspecified government employees (*id.* at 8-9). A hearing that amounts to a fishing expedition is not warranted based only on such speculation. Through its pretrial and post-trial affidavits, the government demonstrated that it had independent sources for all of the evidence it adduced at trial, whether on direct or cross-examination, and petitioners offered nothing that cast doubt on that showing.

[15] The Paxson petitioners state that "long-established practice has been to grant adversarial hearings on *Kastigar* motions." 88-1325 Pet. 10. The only decision cited, however, *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977), does not support that contention. *Nemes* ruled, in this respect, only that where the government had satisfied the trial court "that the evidence presented to the federal grand jury and to the trial jury was derived from [independent] sources * * *," the government's burden under *Kastigar* was satisfied. *Id.* at 55 (footnote omitted).

ture" (*id.* at 22) or on the "lawfulness of the joint venture" (*id.* at 24). The instructions petitioners proposed, however, were misleading.

In particular, the Dynalectric petitioners' proposed "joint venture" instructions would have misled the jury into believing that, if an arrangement could be called a "joint venture," the bid-rigging agreement would be lawful. For example, the Dynalectric petitioners' proposed Instruction No. 18 would have required acquittal if Ewalt's bid-rigging agreement was "accompanied by or part of a legitimate joint venture or partnership with Paxson." 4 R. Doc. 92 at 28. Even if there was a "legitimate" joint venture between Paxson Electric and Dynalectric, however, that agreement was not a license for the two of them to rig bids with Fischbach, which was never alleged to be part of any "joint venture." Similarly, proposed Instruction No. 15 stated that "[i]t is also not illegal for contractors to bid for a job or to perform work as a legitimate joint venture. In a joint venture, two or more contractors join together and submit a single bid on a project." *Id.* at 22-23. In this case, however, Paxson Electric and Dynalectric did not submit "a single bid"; they submitted two separate bids, which led the letting authorities to believe the bids were independently derived. Thus, the requested instruction had no basis in the record.

In any event, the district court properly charged the jury on the elements of the Sherman Act offense. In order to convict, the jury was required to find (24 R. 3319, 3322-3323) "that a conspiracy to rig bids as alleged was knowingly formed and was existing at or before submission of the bids on September 7, 1979"; "that the conspiracy continued at least until September 20, 1981[;] and that one or more members of the conspiracy committed acts in furtherance of the conspiracy * * * on or after that date." Contrary to petitioners' claim (88-1328 Pet. 23),

therefore, the charge did not "amount[ ] effectively to a directed verdict against the defendants on the statute of limitations issue."[16] Nor did the instructions "force[ ] the jury to treat the joint venture itself as a *per se* Sherman Act offense." *Ibid.* The jury could not have returned a guilty verdict unless it found that the defendants agreed to rig bids.

5. Finally, the Dynalectric petitioners argue (88-1328 Pet. 24-27) that the court of appeals erred in affirming the district court's refusal to admit portions of petitioners' economic evidence. That argument is without merit. The evidence in question was irrelevant to the issues on which it was offered.

The district court gave petitioners the opportunity to show that their bids were legitimately prepared and were not "excessive" through evidence showing how their bids were prepared and showing the factors they took into account in bidding. The court refused, however, to prolong the trial with economic evidence of fluctuating copper prices and general market conditions, to be introduced from sources that had no familiarity with or personal knowledge of the Snapfinger bidding. Such evidence was properly excluded because no one who had prepared the bids claimed to have relied on copper prices and general market factors. 19 R. 2089-2098; 20 R. 2145-2151; 21 R. 2602-2613; 16 R. 1457-1460. Indeed, petitioner Ewalt admitted that there was no reference to fluctuating copper prices during the preparation of Dynalectric's bid. 16 R.

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[16] While the district court rejected petitioners' generalized "joint venture" instructions as "superfluous and confusing" (Pet. App. 72a), the instructions actually given clearly required that, to convict, the jury must find that the agreement to rig bids was made before the submission of the bids. It was immaterial whether the exact amount of consideration Dynalectric would receive was specified at that time. Compare 88-1328 Pet. 22 n.29.

1456. Hence, the evidence was not relevant to explaining why the bids were set as they were.[17]

Moreover, contrary to petitioners' suggestion (88-1328 Pet. 25), the government did not rely on the size of the bids or the profits as circumstantial proof of the existence of the conspiracy. The district court ruled in that context that it would not permit either petitioners or the government to argue the reasonableness or unreasonableness of prices and profits. 20 R. 2157. And the jury was expressly charged: "neither the amount of profits made by any of the defendants on the Snapfinger jobs nor the form in which those profits were ultimately paid or realized are relevant to the issue of whether the defendants agreed to fix or rig the bids. Rather, the proper focus is whether an agreement to rig the bids was made as alleged." 24 R. 3320. In these circumstances, there was no abuse of discretion in the district court's refusal to admit some of petitioners' economic evidence.

[17] That other courts permit defendants to introduce "*relevant* economic data" to support a claim that there was no agreement (88-1328 Pet. 26 (emphasis added)) does not create a conflict with the decision in this case, where the court held the particular economic evidence to be irrelevant.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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